No. 75-823

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAYMOND BEECHER, PETITIONER

v.

CASEY D. STENGEL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the evidence was sufficient to allow a jury to find, under instructions to which there was no objection, that the actions of an off-duty police officer were pursuant to his official duty and therefore "under color of law."

INTEREST OF THE UNITED STATES

An act under "color of law" wilfully depriving an individual of his constitutional rights is a felony,

in violation of 18 U.S.C. 242. Prosecutions for violations of Section 242 often charge public officials with unconstitutional action in carrying out their official duties. Although this case is a private action brought under 42 U.S.C. 1983, that statute, too, deals with actions taken "under color of law" depriving individuals of constitutional rights. Because the phrase "under color of law" is "accorded the same construction in both statutes," *Monroe* v. *Pape*, 365 U.S. 167, 185,[1] the Court's holding in this case would affect prosecutions under 18 U.S.C. 242.

STATEMENT

1. Petitioner is a police officer employed by the City of Columbus, Ohio (A. 166). On the night of March 1, 1971, while off duty, he was at a bar with his girlfriend and one other couple. Respondent Stengel, Robert D. Ruff and Michael J. D. Noe also were present.[2]

During the course of the evening, Noe and Ruff became involved in an altercation with other patrons (A. 45, 142, 172). As petitioner described events (A. 173), "Kyle Morgan, who was * * * too intoxicated to even defend himself, was being beaten and stomped by two men." Petitioner decided to intervene. He testified (*ibid.*):

[1] See also *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 n. 7, 166.

[2] The administrators of the estates of Ruff and Noe are respondents in this Court.

> At that point I realized that I could not let this scene continue any longer and I made up my mind that I was absolutely one way or the other going to arrest all three men—correction, at least two of these men.

It is not clear how petitioner accomplished his objective of becoming involved. Petitioner, whose version of events was corroborated by his girlfriend, testified that he attempted to reach an outdoor telephone to call other policemen and that, as he arose from his booth with his police-issue tear gas canister in hand (A. 177), he was attacked from behind by respondent Stengel (A. 111, 173-174). Respondent Stengel testified that petitioner accosted Ruff, and that he (Stengel) knocked petitioner down while trying to separate petitioner from Ruff (A. 45-46).

While petitioner was grappling with respondent Stengel on the floor of the bar, he shot Stengel, paralyzing him; he also shot and killed Ruff (A. 176). Petitioner testified that Noe then ran out the door of the bar (A. 176); that he "chased Mr. Noe outside"; and that during the ensuing struggle petitioner's gun went off, killing Noe (*ibid.*). Petitioner used his official side arm, which he and all other Columbus policemen were required to carry at all times (A. 218).

2. Respondents instituted this action on February 28, 1972. They alleged that petitioner acted under color of law to deprive them of their civil rights (A.

8-12, 17, 19).[3] Respondents requested a jury trial (A. 23). Trial began on June 10, 1974.

In addition to petitioner's statement that he intervened in the brawl to arrest the participants, the jury also received the following evidence tending to indicate that petitioner acted "under color of law":

a. Dwight Joseph, who was the Chief of Police at the time of this incident, testified that the rule requiring off-duty police officers to carry their weapons at all times was based on the fact that Columbus police officers were "expected to take action in any type of police or criminal activity 24 hours a day" (A. 76). Joseph stated that officers "would be subject to discipline if they didn't take action" (*ibid.*). In his opinion, petitioner's actions were taken pursuant to this regulation (A. 77).

b. Petitioner received workmen's compensation benefits for the injuries he incurred during the altercation (A. 224-241). Petitioner applied for these benefits on a form that required him to aver that he was seeking "compensation for injuries sustained in the course of my employment" (A. 225). The Chief of Police signed and approved the report of these injuries (A. 78, 241), and the Safety Coordinator

[3] Respondents also sued several city officials, alleging that the officials participated in a conspiracy to suppress the facts of this incident and to harass respondent Stengel; the complaint alleged that this action violated 42 U.S.C. 1985 (A. 8-9, 14-17, 18, 20). The claims against these defendants were dismissed by the court at the close of respondents' case (A. 198-206).

of the City Department of Industrial Relations certified "that this is a valid claim" (A. 227). The claim was approved by the Industrial Commission (A. 237).

c. Petitioner applied for and received leave for duty-related injuries. A form, signed by the Chief City Physician and dated March 2, 1971, stated that petitioner did not work on March 1, 1971, because of an "*injury on duty* received on March 1, 1971, 2:15 a.m." (emphasis in original). The form had a check in the box next to text stating "injury on duty —deduct from injury leave" (A. 245). This form also contained a handwritten notation at the bottom, which read: "although this officer was 'off duty'—he was in line of duty under circumstances relating to Police duties. J.P." (A. 245). Chief Joseph testified that "J.P." was a member of the Industrial Commission (A. 79).

d. A Board of Inquiry was convened to determine the propriety of petitioner's use of his official side arm. The Board's conclusion, in a letter to petitioner, absolved him from departmental responsibility. It stated that "the discharge of your weapon was proper under the circumstances" (A. 246) and that "your actions were in the line of duty" (A. 247).

3. On June 18, 1974, the jury returned a verdict in favor of respondents. The court's judgment made the following awards: $800,000 in actual and $1,000 in punitive damages to respondent Stengel; $19,000 in actual and $1,000 in punitive damages to the administrator of the estate of Ruff; $9,000 actual and

$1,000 punitive damages to the administrator of the estate of Noe (A. 254-255). Petitioner's motion for judgment notwithstanding the verdict was denied by the district court (A. 259-260).

On appeal, petitioner argued that the evidence is insufficient to support a finding that he was acting under color of law (Pet. App. 24). He argued that as a matter of law an off-duty officer cannot act under color of law (*ibid.*). The court of appeals held that no such *per se* test was appropriate, but that the "nature of the act performed" is the most important consideration in a test considering all of the circumstances (*id.* at 25). The court held that the totality of the evidence, including the requirement that petitioner carry a weapon, the intervention by petitioner in the brawl, the testimony of the Chief of Police that an off-duty officer must take action when witnessing criminal activity, the award of workmen's compensation, and the finding of the Board of Inquiry that petitioner was acting in the line of duty, "abundantly supports the jury's verdict" (*id.* at 26) that petitioner was acting under color of law.[4]

SUMMARY OF ARGUMENT

I

We believe that the writ of certiorari should be dismissed as improvidently granted. The petition for

[4] Other issues decided by the court of appeals, including evidentiary matters, liability, and the amount of damages, are not before this Court.

a writ of certiorari presented the question whether the fact that a police officer was required to carry a gun while off duty was enough, standing by itself, to make every use of that gun action "under color of law." The court of appeals did not adopt such a theory, however; it relied upon the totality of the evidence. The instructions to the jury, to which petitioner's counsel did not object at trial, informed the jury that it could return a verdict against petitioner only if the unlawful acts were done while petitioner was "purporting or pretending to act in the performance of his official duties" (A. 209). Because petitioner cannot now assail the legal standards used by the jury, it would be inappropriate for this Court to consider whatever subtle question may have been lurking in the instructions given. Our review of the record of the case therefore leads us to conclude that it presents "considerations * * * which were not manifest or fully apprehended [by this Court] at the time certiorari was granted" (*Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (Harlan, J., concurring and dissenting)), and we suggest that the writ should be dismissed.

II

If the Court reaches the merits, it should affirm the judgment of the court of appeals. The instructions to the jury were taken almost *verbatim* from the seminal opinions of this Court in *United States* v. *Classic*, 313 U.S. 299, 326, and *Screws* v. *United States*, 325 U.S. 91, 111. They instructed the jury

that petitioner could be acting under "color of law" only if he acted in the course of his official duties. There was abundant evidence from which the jury could have concluded that he so acted. Petitioner testified that he intended to arrest two of the participants in the brawl (A. 173). The Chief of Police testified that petitioner acted pursuant to a departmental regulation requiring officers to respond to criminal activity at all times (A. 77). Petitioner applied for, and received, workmen's compensation on account of injuries incurred, during the brawl, in the course of his employment (A. 224-241). He took injury leave for injuries incurred in the line of duty (A. 245). The police firearms board concluded that petitioner discharged his weapon in the "line of duty" (A. 247). Perhaps other circumstances, such as petitioner's failure to identify himself as a police officer, look the other way. But the evidence must now be evaluated in the light most favorable to respondents, and we submit that it is sufficient to support the jury's verdict.

ARGUMENT

I

The Writ Should Be Dismissed As Improvidently Granted

The petition for a writ of certiorari presented the following question (Pet. 2):

> Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, to be an act "under color of law" within the meaning of 42 U.S.C. § 1983?

The petition argued that the courts below relied on the "use of a weapon * * * to raise the inference that the weapon was used under color of law" (Pet. 14-15).

We believe that the question framed by petitioner is not presented by this case. The court of appeals did not state that the city's regulation requiring petitioner to carry a gun was enough by itself to permit an inference that petitioner acted under color of law. It stated (Pet. App. 25):

> There was other evidence which permitted an inference that Belcher, although he overstepped the bounds, intervened in the dispute pursuant to a duty imposed by police department regulations.

The court then referred to much of the evidence summarized previously (see pages 4-5, *supra*), and held that this evidence supported the jury's verdict (Pet. App. 26).

This case, involving only an assault upon a verdict by a jury, presents two possible issues for review here. The first is whether the jury was properly instructed. The second is whether the evidence is sufficient to support a verdict under the instructions given.

1. The district court instructed the jury that it could return a verdict against petitioner only if it found that petitioner acted in the tavern "then and there * * * under color of some state or local law" (A. 209). It amplified this instruction as follows (A. 209-210):

> Acts are done under color of law of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority.
>
> In order for unlawful acts of an official to be done under color of any law, however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties. That is to say, the unlawful acts must consist in an abuse or misuse of power which is possessed by the official only because he is an official, and the unlawful acts must be of such a nature and be committed under such circumstances that they would not have occurred but for the fact that the person committing them was an official purporting to exercise his official powers.
>
> As you will note, the Federal statute which the Defendant is alleged to have violated covers not only acts done by an official under color of any state law but also acts done by an official under color of any ordinance or regulation of a municipality of a state, as well as acts done by an official under color of any regulation issued by a municipal official.
>
> The manner in which Defendant Belcher may have acted under color of state law was that he carried a gun, a side arm, while off duty. The reason he carried a weapon is because of a police regulation issued by the Chief of Police of the Columbus Police Department which reads in part as follows:
>
> "Members of the Division of Police while off duty shall carry the weapon and ammunition issued to them:
>
> One: Carrying a personal weapon off duty. Members of the Division of Police desiring to carry a personal handgun instead of their issued revolver, shall request permission through the Police Range Officer."

For the reasons discussed at pages 14-18, *infra*, we submit that this instruction, taken as a whole,[5] properly apprised the jury of the meaning of "under color of law." It instructed the jury that it could not return a verdict against petitioner unless it found that his official position was a *sine qua non* of the injury.

Petitioner now appears to object to the last portion of this charge (Br. 10-11, 17), which informed the jury that petitioner "may have" acted under color of law by carrying a side arm while off duty. That arguably ambiguous portion of the charge cannot realistically be isolated from the remainder, which was a model instruction in most respects. But the

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[5] Even in criminal cases, a challenged portion of the instructions is to be judged in the context of the overall charge. See *United States* v. *Park*, 421 U.S. 658, 674-676; *Cupp* v. *Naughten*, 414 U.S. 141, 146-147; *Boyd* v. *United States*, 271 U.S. 104, 107-108.

more serious problem with petitioner's position is that he did not object to the instructions at the time of trial. When asked by the court whether he had any objections to the proposed instructions, petitioner's attorney responded (Tr. 784-785): "No objections to the entire charge of the Court." This was consistent with petitioner's trial strategy, which involved persuading the jury that petitioner acted reasonably under the circumstances, including his duties as an officer. Thus, during argument on petitioner's motion for a directed verdict, petitioner's counsel stated (A. 199): "Your Honor, it is my position that [petitioner] was acting in line of duty under color of law as a policeman of the City of Columbus." Counsel went on to explain petitioner's theory of the case (*ibid.*):

> It is our belief first and foremost that Officer Raymond Belcher at that time was defending himself when he considered himself to be in grave, serious danger of great bodily harm and/or death as a result of what was being done to him.
>
> It is only in the alternative, or in addition thereto, that we would argue that the force was used pursuant to the actions of a police officer who was a witness to a crime going on in his presence and was acting as a police officer.

Accordingly, petitioner cannot now object to the instructions to the jury. "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to

consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51. See also *Boyd* v. *United States*, 271 U.S. 104, 108; *Stein* v. *New York*, 346 U.S. 156, 173.

2. Because petitioner cannot now attack the instructions to the jury, the only line of argument properly available to him is that the evidence is not sufficient to support a verdict returned under the instructions given. That is ordinarily not a question warranting review by this Court, for it does not call upon the Court to consider whether the legal standards upon which the charge was based were correct. Because petitioner did not object to the charge, the legal standards governing this case must be accepted as given. Moreover, for the reasons set out at pages 18-21, *infra*, we submit that the evidence was sufficient to support the verdict under any reasonable view of the law.[6]

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[6] The only question presented in the petition dealt with whether petitioner acted under color of law. There is no claim before the Court that respondents failed to establish any of the other prerequisites to liability under Section 1983 (*e.g.*, "citizen of the United States or other person within the jurisdiction thereof * * *," "deprivation of any rights, privileges, or immunities secured by the Constitution * * *)." For example, petitioner's actions indisputably deprived two people of "life," and there is no claim that petitioner's infliction of injury upon Stengel did not deprive him of "life, liberty, or property" within the meaning of the Due Process Clause of the Fourteenth Amendment. Nor, in our view, could it persuasively be argued that either the federal government under the Fifth Amendment or the States under the Fourteenth are free intentionally to inflict such bodily injury

Our review of the record in this case therefore leads us to conclude that it presents "considerations * * * which were not manifest or fully apprehended [by this Court] at the time certiorari was granted" (*Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (Harlan, J., concurring and dissenting)). We suggest that the writ be dismissed as improvidently granted. See, *e.g.*, *Duncan* v. *Tennessee*, 405 U.S. 127; *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74-75.

II

The Evidence Is Sufficient To Support The Jury's Verdict

Petitioner argues that no evidence presented to the jury indicates that he acted under color of law (Br. 18). We submit, to the contrary, that the verdict of the jury is supported by the weight of the evidence. If the Court reaches the merits of this case, therefore, it should affirm the judgment of the court of appeals.

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without observing due process safeguards (if, indeed, the intentional infliction of such injury would be permissible at all under the Eighth and Fourteenth Amendments). Compare, *e.g.*, *Rochin* v. *California*, 342 U.S. 165, and *Schmerber* v. *California*, 384 U.S. 757, 766-772, with *Paul* v. *Davis*, No. 74-981, decided March 23, 1976. See also, the reference to "life or limb" in the Fifth Amendment's double jeopardy clause.

A. *The District Court Correctly Instructed The Jury That Action Is "Under Color Of Law" If It Purports To Be An Exercise Of The Official Authority Of The Wrongdoer*

The instructions to the jury in this case were taken almost *verbatim* from the seminal opinions of this court in *United States* v. *Classic*, 313 U.S. 299, and *Screws* v. *United States*, 325 U.S. 91. The Court held in *Classic*, *supra*, 313 U.S. at 326, that:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

Screws observed that there may be instances in which actions of public officers remain personal actions. It adopted the following test to distinguish public from private actions (325 U.S. at 111):

> It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.

The boundaries marked by *Classic* and *Screws* have repeatedly been reaffirmed. See, *e.g.*, *Williams* v. *United States*, 341 U.S. 97, 99; *Monroe* v. *Pape*, 365 U.S. 167, 187; *United States* v. *Price*, 383 U.S. 787. See also *Watkins* v. *Oaklawn Jockey Club*, 183 F.2d 440, 443 (C.A. 8). And, since these decisions merely construe an Act of Congress, this settled construction should not be disturbed absent the clearest evidence that the Court was wrong. See, *e.g.*, *Runyon* v.

McCrary, No. 75-62, decided June 25, 1976, slip op. 12-13; *Flood* v. *Kuhn*, 407 U.S. 258, 269-285; *Monroe* v. *Pape*, *supra*, 365 U.S. at 184-185.

The tests established in *Classic* and *Screws*, of course, do not give categorical answers to the many questions posed by the varieties of human conduct that may be thought to be "official." See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144. Courts usually have examined the actions of a police officer against the backdrop of official police conduct to which the actions in question may be related. If the facts show that the action in question was performed in reliance upon, or was otherwise closely related to, the duties the officer was called upon to perform in an official capacity, the cases allow a jury to conclude that it was taken under "color of law," even if the specific action flagrantly overstepped the bounds of acceptable police practices.[7]

[7] The Court has held on many occasions that the Fourteenth Amendment was designed not only to overcome unjust state laws, but also to prevent abuse of the State's power. In order to achieve the latter goal, the Amendment must reach official conduct even when it violates state law. See *Ex parte Virginia*, 100 U.S. 339, 346-347; *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278, 287 (The Fourteenth Amendment reaches "the possibility of an abuse by a state officer or representative of the powers possessed * * *. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible *or is efficiently aided* by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant * * *" (emphasis added).) This is the theory that informed *Screws*, *Classic*, *Monroe*, *Price* and similar cases.

It also accounts for the "private guard" cases. Where a police officer who is also working as a private guard takes action which is consistent with, and related to, a duty imposed on a police officer by state or local law, these actions are under color of law even if the officer claims to have acted in a purely private capacity. In *Williams* v. *United States*, *supra*, a lumber yard guard held a special police officer's card issued by the City of Miami. The Court held that the actions of the guard, beating confessions out of four suspected thieves, were taken under color of law. In *Griffin* v. *Maryland*, 378 U.S. 130, a deputy sheriff was employed as a guard at an amusement park; his actions in arresting individuals for trespassing, transporting them to the police station and applying for an arrest warrant, were held to be action of the State. "If an individual is possessed of state authority and purports to act under that authority, his action is state action." 378 U.S. at 135. Similarly in *Crews* v. *United States*, 160 F.2d 746, 750 (C.A. 5), an off-duty constable who beat and caused the death of an individual after taking him "into custody in a manner which appears on its face to be in the exercise of authority of law," was found to be acting under color of law. See also *Catlette* v. *United States*, 132 F.2d 902 (C.A. 4); *United States* v. *Price*, *supra*.

On the other hand, in *Watkins* v. *Oaklawn Jockey Club*, *supra*, 183 F.2d at 443, police officers working as race-track guards ejected a non-abusive patron from the track on the order of the track owner. The court found that this action was not taken under color of law, noting that the ejectment was in no way related to official police duty. In *Johnson* v. *Hackett*, 284 F. Supp. 933 (E.D. Pa.), the court found that an offer by a police officer to fight another individual after hours, and his calling that individual abusive names, were not actions under color of law because they were not related to official police duty. Similarly, in *Robinson* v. *Davis*, 447

The district court's instructions to the jury informed it that it must find that petitioner was "purporting or pretending to act in the performance of his official duties" (A. 209). The court of appeals analyzed the entire "nature of the act performed" (Pet. App. 25) and the surrounding circumstances to determine whether petitioner had acted under color of law. Petitioner himself advances the same standard (Br. 17). There was therefore no error in the charge to the jury or in the legal standard applied by the court of appeals.[8] We now turn to the question

F.2d 753 (C.A. 4), certiorari denied, 405 U.S. 979, the court held that the actions of college security guards who told certain students to report to the Dean did not, simply because the guards who were working for the college were also police officers, amount to state action. The court found that the action taken was consistent with the position of college guards and was not related to a duty imposed on a police officer by state law.

[8] Petitioner argues (Br. 10-11, 17) that a portion of the charge to the jury allowed it to infer that petitioner was acting under color of law solely from the fact that he was required to carry a gun while off duty. We do not agree with petitioner that the instruction had this effect. It immediately followed the court's comprehensive and accurate statement of the law. The language of the now-contested instruction stated only that petitioner "may have" acted under color of law in carrying the side arm. Read in context, this portion of the instruction simply drew the jury's attention to one factor to be considered. Although the instruction arguably is ambiguous on this point, and although it undoubtedly would have been better for the court to enumerate other factors that the jury should consider, petitioner, who did not object to the instructions, cannot now capitalize upon the alleged ambiguity omissions in this civil case. *Indianapolis and St. Louis R.R. Co.* v. *Horst*, 93 U.S. 291.

whether the evidence supports the jury's conclusion that petitioner's actions were related to official police activity.

B. *The Circumstances Indicate That Petitioner's Status As A Police Officer Was Intimately Related To His Deeds*

The question whether an official's actions were taken under color of law is properly to be determined by the jury. *Williams* v. *United States*, *supra*, 341 U.S. at 99. Petitioner's contention that the evidence introduced "did not support the jury's determination, implicit in its verdict, that the Petitioner had acted under color of law" (Br. 12) therefore requires a review of the evidence presented. The jury's verdict must be sustained if, taking the evidence most favorably to respondents, "there is an evidentiary basis for the jury's verdict." *Lavender* v. *Kurn*, 327 U.S. 645, 653; *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108. We submit that the evidence clearly is sufficient to sustain the verdict.

Although petitioner did not identify himself during the altercation as a police officer, he testified that "I made up my mind that I was absolutely one way or the other going to arrest all three men—correction, at least two of these men" (A. 173). Testimony was introduced that petitioner arose from his table with his can of police-issue gas upraised (A. 177) and that he interceded in the dispute of his own volition (A. 45-46). The jury could have concluded that petitioner joined the fracas as a police officer. He had a duty, described by his Chief of Police, to respond to

criminal activity at all times (A. 76).[9] Several official and unofficial findings placed in evidence also suggested that petitioner acted in an official capacity. The Chief of Police testified that, in his opinion, petitioner acted pursuant to his official police duty (A. 77). Petitioner applied for, and received, workmen's compensation on account of injuries suffered during employment (A. 224-241). He took injury leave for injuries incurred in the line of duty (A. 245). The police firearms board concluded that petitioner's actions were in the "line of duty" (A. 247).[10]

Petitioner asserts that, because he did not identify himself as a police officer, he could not have been engaged in official conduct (Br. 18-19). Although an oral warning by an officer to a suspect is undoubtedly an important piece of evidence that could lead a jury to believe that the officer was acting, or purporting to act, in his official capacity (*Koehler* v. *United States*, 189 F.2d 711 (C.A. 5), certiorari denied, 342 U.S. 852), we cannot agree with petitioner's attempt to

[9] This duty was the basis for the regulation requiring off-duty officers to carry a weapon. Cf. Pet. Br. 23. We therefore see nothing objectionable about holding petitioner to account for his use of the weapon in circumstances such as those here or allowing such use to give rise to an inference that he acted under color of law.

[10] Petitioner argues that this evidence was offered during the conspiracy portion of the trial and is therefore not "relevant" to a determination whether his actions were under color of law (Br. 20). But the evidence was not offered or admitted under any theory that would limit its use in this fashion, and we know of none. Compare Fed. R. Evid. 401 and 402 with Fed. R. Evid. 105.

make this a litmus paper test. A disclaimer of official status before taking action does not, by itself, turn public action into private action. *Catlette* v. *United States*, 132 F.2d 902 (C.A. 4). A failure to identify oneself as a police officer may be a relevant factor, even a dispositive factor in some cases, but it cannot become a device by which a police officer can exempt himself from the strictures of 18 U.S.C. 242 or absolve himself of liability under 42 U.S.C. 1983. The officer's actions, of which a spoken identification, lack of identification or disclaimer are part, must be considered objectively against the backdrop of the possible official duties to which they may relate. In this case, petitioner's intervention in the altercation was found, based on substantial evidence, to have been undertaken pursuant to a police regulation requiring just such action. The uncontroverted fact that he failed to identify himself as a police officer is clearly relevant evidence, but is not enough to rebut as a matter of law the other evidence considered by the jury.[11]

[11] Similarly, the determination does not turn on the presence or absence of a police uniform. Compare *Robinson* v. *Davis*, 447 F.2d 753 (C.A. 4), certiorari denied, 405 U.S. 979, and *Johnson* v. *Hackett*, 284 F. Supp. 933 (E.D. Pa.) (officer in uniform but not acting under color of law), with *Price*, *supra*, *Koehler*, *supra*, and *Crews*, *supra* (officer not in uniform, but actions were found to be under color of law).

Petitioner also suggests that the "color of law" standard should turn on whether the victim understood the actor to be a police officer (Br. 19). Although this, too, is a relevant factor for the judge or jury to consider (*Crews*, *supra*, 160 F.2d at 750), it is quite subjective in nature and would lend itself

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. If the Court decides the case on the merits, it should affirm the judgment of the court of appeals.

Respectfully submitted.

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to many after-the-fact revisions by witnesses. And it might be impossible of application where, as here, a victim is deceased.

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